

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID GARZA CANTU,)	
)	No. CV-10-335-CI
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 14, 16.) Attorney Jeffrey Schwab represents David Garza Cantu (Plaintiff); Special Assistant United States Attorney Benjamin Groebner represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 11.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on August 25, 2008. (Tr. 134-42.) He alleged disability due to headaches, pain in his hips, upper and lower back, tailbone, elbows and hands, and he also alleged his hands were numb. (Tr. 161.) He alleged an onset date of January 6, 2008. (Tr. 161.) His claim was denied initially and

1 on reconsideration. (Tr. 90-93; 96-99.) Plaintiff requested a
2 hearing before an administrative law judge (ALJ), which was held on
3 December 17, 2009, before ALJ James W. Sherry. (Tr. 47-85.) At the
4 hearing, vocational expert Daniel McKinney and Plaintiff testified.
5 (Tr. 53-84.) The ALJ denied benefits on February 3, 2010, and the
6 Appeals Council denied review. (Tr. 1-3; 15-26.) The instant
7 matter is before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 60 years old. (Tr. 53.) He left school
12 after the ninth grade and later earned a GED. (Tr. 54.) He lives
13 in a mobile home with his wife. (Tr. 54.) Plaintiff earned a
14 living selling cars, as a farm laborer, truck driver, and a heavy
15 machine operator. (Tr. 51; 58.) He testified that he fell off a
16 semi-truck in 2002 and hit his head. Later, he suffered two
17 additional head injuries, one in 2004 and one in 2007. (Tr. 59.)
18 He reported that he stopped working due to headaches, pain in his
19 hips, back, elbow, and pain and numbness in his hands. (Tr. 161.)
20 He testified that he can read the newspaper "a little bit," but he
21 forgets what he reads, and he has difficulty comprehending what he
22 has read. (Tr. 54.) He testified that he has to sit down frequently,
23 and cannot stand or walk for too long. (Tr. 66.) He goes to his
24 in-laws' house with his spouse most days and, while there, sits and
25 visits. (Tr. 68-69.) Plaintiff testified that he can drive short
26 distances, watches four hours of television per day, and he helps
27 with household chores. He bought a fishing license because he
28 thought his son would invite him fishing, but he went fishing only

1 once in the past year. (Tr. 72.)

2 **ADMINISTRATIVE DECISION**

3 ALJ James Sherry found Plaintiff's date of last insured for DIB
4 purposes was December 31, 2013. (Tr. 15.) At step one, the ALJ
5 found Plaintiff had "probably" engaged in substantial gainful
6 activity since January 6, 2008, the alleged onset date. (Tr. 17.)
7 Because it was "unclear how much money the claimant actually earned
8 since the alleged onset date," the ALJ proceeded with the sequential
9 five-step analysis. (Tr. 17.) At step two, the ALJ found Plaintiff
10 had the following severe impairments: (1) degenerative disc disease
11 of the cervical spine; (2) status-post discectomy with fusion; (3)
12 lumbar strain; (4) right shoulder strain; (5) headaches; and (6)
13 mild carpal tunnel syndrome. (Tr. 18.) The ALJ determined at step
14 three Plaintiff's medically determinable impairments, alone and in
15 combination, did not meet or medically equal one of the listed
16 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
17 (Listings). (Tr. 19.) The ALJ found Plaintiff's subjective
18 complaints regarding functional limitations were not fully credible.
19 (Tr. 20-21.) At step four, he determined Plaintiff's residual
20 functional capacity as the ability to:

21 [P]erform light work as defined in 20 C.F.R. 404.1567(b)
22 and 416.967(b) except that the claimant is limited to
23 lifting 20 pounds at one time and frequently lifting or
24 carrying 10 pounds. The claimant can stand/walk and sit
25 for a total of six hours each in an eight-hour workday.
26 The claimant has no restrictions in pushing or pulling
27 with his upper extremities, but should never climb
ladders, ropes or scaffolds. He can occasionally climb
ramps or stairs, frequently balance, stoop, crouch, kneel,
crawl, reach and reach overhead. The claimant should
avoid concentrated exposure to extreme cold, unprotected
heights, and the use of moving machinery.

28 (Tr. 19.) The ALJ found Plaintiff could perform his past relevant

1 work selling cars. (Tr. 25.) The ALJ ultimately found Plaintiff
2 was not disabled from January 6, 2008, through the date of his
3 decision (February 3, 2010). (Tr. 26.)

4 STANDARD OF REVIEW

5 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
6 court set out the standard of review:

7 A district court's order upholding the Commissioner's
8 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
9 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
10 Commissioner may be reversed only if it is not supported
11 by substantial evidence or if it is based on legal error.
12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
13 Substantial evidence is defined as being more than a mere
14 scintilla, but less than a preponderance. *Id.* at 1098.
15 Put another way, substantial evidence is such relevant
16 evidence as a reasonable mind might accept as adequate to
17 support a conclusion. *Richardson v. Perales*, 402 U.S.
18 389, 401 (1971). If the evidence is susceptible to more
19 than one rational interpretation, the court may not
20 substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
22 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

23 The ALJ is responsible for determining credibility,
24 resolving conflicts in medical testimony, and resolving
25 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
26 Cir. 1995). The ALJ's determinations of law are reviewed
27 *de novo*, although deference is owed to a reasonable
28 construction of the applicable statutes. *McNatt v. Apfel*,
29 201 F.3d 1084, 1087 (9th Cir. 2000).

30 It is the role of the trier of fact, not this court, to resolve
31 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
32 supports more than one rational interpretation, the court may not
33 substitute its judgment for that of the Commissioner. *Tackett*, 180
34 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
35 Nevertheless, a decision supported by substantial evidence will
36 still be set aside if the proper legal standards were not applied in
37 weighing the evidence and making the decision. *Browner v. Secretary*
38 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If

1 there is substantial evidence to support the administrative
2 findings, or if there is conflicting evidence that will support a
3 finding of either disability or non-disability, the finding of the
4 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
5 1230 (9th Cir. 1987).

6 SEQUENTIAL EVALUATION PROCESS

7 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
8 requirements necessary to establish disability:

9 Under the Social Security Act, individuals who are
10 "under a disability" are eligible to receive benefits. 42
11 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
12 medically determinable physical or mental impairment"
13 which prevents one from engaging "in any substantial
14 gainful activity" and is expected to result in death or
15 last "for a continuous period of not less than 12 months."
16 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
17 from "anatomical, physiological, or psychological
18 abnormalities which are demonstrable by medically
19 acceptable clinical and laboratory diagnostic techniques."
20 42 U.S.C. § 423(d)(3). The Act also provides that a
21 claimant will be eligible for benefits only if his
22 impairments "are of such severity that he is not only
23 unable to do his previous work but cannot, considering his
24 age, education and work experience, engage in any other
25 kind of substantial gainful work which exists in the
26 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
27 the definition of disability consists of both medical and
28 vocational components.

20 The Commissioner has established a five-step sequential
21 evaluation process for determining whether a person is disabled. 20
22 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
23 137, 140-42 (1987). In steps one through four, the burden of proof
24 rests upon the claimant to establish a prima facie case of
25 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
26 920, 921 (9th Cir. 1971). This burden is met once a claimant
27 establishes that a medically determinable physical or mental
28 impairment prevents her from engaging in her previous occupation.

20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the presentation of 'complete and detailed objective medical reports of his condition from licensed medical professionals.'" *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff contends the ALJ erred by finding that Plaintiff engaged in substantial gainful activity in 2008. (ECF No. 15 at 7.) He also contends the ALJ erred by finding Plaintiff lacked credibility and by failing to find that Plaintiff had a severe mental impairment. (ECF No. 15 at 8-15.) Finally, Plaintiff contends that the ALJ erred in determining Plaintiff's residual functional capacity. (ECF No. 15 at 15-16.) Defendant contends the ALJ's decision is supported by substantial evidence and free of legal error. (ECF No. 16.)

DISCUSSION

1. Substantial Gainful Activity.

The Plaintiff contends the ALJ erred by finding that Plaintiff had engaged in gainful substantial activity in 2008. Plaintiff reported income in 2008 of \$8,866 that he said he billed to people he helped with immigration paperwork. (Tr. 57.) The ALJ found that "[ilt is probably [sic] that the claimant has engaged in substantial

1 gainful activity since January 6, 2008[.]” (Tr. 17.) The ALJ found
2 Plaintiff’s assertion that he billed the amounts but was never paid
3 was “not very credible.” (Tr. 17.) The ALJ concluded, “[h]owever,
4 because it is unclear how much money the claimant actually earned
5 since the alleged onset date, the undersigned will continue with the
6 sequential five-step analysis.” (Tr. 17.)

7 Substantial gainful activity is “work activity that is both
8 substantial and gainful.” 20 C.F.R. §§ 404.1572, 416.972.
9 Substantial work activity is work activity that involves doing
10 significant physical or mental activities. Work may be substantial
11 even if it is done on a part-time basis, or if the claimant does
12 less, gets paid less, or has less responsibility than when the
13 claimant worked before. 20 C.F.R. §§ 404.1572(a), 416.972(a).
14 Gainful work activity is work activity that a claimant does for pay
15 or profit, and it is gainful if it is the kind of work usually done
16 for pay or profit, whether or not a profit is realized. 20 C.F.R.
17 §§ 404.1572(b), 416.972(b). “Earnings can be a presumptive, but not
18 conclusive, sign of whether a job is substantial gainful activity.”
19 *Lewis v. Apfel*, 236 F.3d 503, 515 (9th Cir. 2001). Illegal activity
20 can qualify as substantial gainful activity. 20 C.F.R. §§ 404.1571,
21 416.971. Additionally, substantial gainful activity may be found
22 when the claimant receives no income. 20 C.F.R. § 404.1572(b),
23 416.972(b); *Corrao v. Shalala*, 20 F.3d 943, 946-47 (9th Cir. 1994).

24 In this case, Plaintiff testified that he reported earnings in
25 2008 of \$1,250 at RTK Producers, and \$8,866 in self-employment
26 earnings. (Tr. 57.) The ALJ found Plaintiff’s statements not
27 credible, and as discussed below, Plaintiff’s challenge to the
28 credibility finding fails. The court must uphold the ALJ’s

1 credibility determination when the findings are not based on legal
2 error and are supported by substantial evidence. *Tackett* 180 F.3d
3 at 1097. Moreover, even if Plaintiff did not receive any payments
4 for his work, remuneration is not dispositive. Substantial gainful
5 activity can be found even where the claimant was not paid. 20
6 C.F.R. § 404.1572(b), 416.971; *Corrao*, 20 F.3d at 946-47. As a
7 result, the ALJ's substantial gainful activity finding is supported
8 by substantial evidence and thus, Plaintiff was properly deemed
9 disqualified from benefits.

10 Even if the ALJ erred in finding Plaintiff engaged in
11 substantial gainful activity, the error is harmless. Harmless error
12 occurs only if the error is inconsequential to the ultimate
13 nondisability determination. See *Robbins v. Soc. Sec. Admin.*, 466
14 F.3d 880, 885 (9th Cir. 2006); *Stout v. Comm'r, Soc. Sec. Admin.*,
15 454 F.3d 1050, 1055-56 (9th Cir. 2006). Because the ALJ made
16 properly supported alternate findings after completing the
17 sequential evaluation process, any error which may have been made at
18 step one is inconsequential to the ultimate nondisability
19 determination.

20 **2. Credibility.**

21 Plaintiff contends that the ALJ erred by finding him not
22 credible. (ECF No. 15 at 8-13.) The ALJ found that Plaintiff's
23 activities of daily living were inconsistent with his claimed
24 impairments. The ALJ found Plaintiff made inconsistent statements
25 about his lawn mowing and his comprehension abilities. Finally, the
26 ALJ relied upon two physical exam reports that indicated Plaintiff
27 exhibited three positive Waddell signs. (Tr. 20.)

28 When the ALJ finds a claimant's statements as to the severity

1 of impairments, pain, and limitations are not credible, the ALJ must
2 make a credibility determination with findings sufficiently specific
3 to permit the court to conclude the ALJ did not arbitrarily
4 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
5 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
6 (9th Cir. 1991). If no affirmative evidence exists that the claimant
7 is malingering, the ALJ must provide "clear and convincing" reasons
8 for rejecting the claimant's allegations regarding the severity of
9 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
10 ALJ engages in a two-step analysis in deciding whether to admit a
11 claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d
12 1273, 1281 (9th Cir. 1996). Under the first step, the ALJ must find
13 the claimant has produced objective medical evidence of an
14 underlying "impairment," and that the impairment, or combination of
15 impairments, "could reasonably be expected to produce pain or other
16 symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986).
17 Once the *Cotton* test is met, the ALJ must evaluate the credibility
18 of the claimant. In evaluating credibility, the ALJ may engage in
19 ordinary techniques of credibility evaluation, including considering
20 claimant's reputation for truthfulness and inconsistencies in
21 claimant's testimony, or between claimant's testimony and conduct,
22 claimant's daily activities, claimant's work record and testimony
23 from physicians and third parties concerning the nature, severity
24 and effect of the symptoms of which claimant complains. *Thomas*, 278
25 F.3d at 958-59.

26 In this case, the ALJ found Plaintiff's complaints about the
27 severity of his impairments less than credible. (Tr. 20.) The ALJ
28 relied partly upon the fact that during two separate physician

1 exams, the physicians noted the presence of at least three Waddell¹
2 signs. The record supports this finding. Notes from a November,
3 2008 exam conducted by Patrick Soto, D.O., indicated that Plaintiff
4 suffered from "chronic pain syndrome with a nonorganic component to
5 the pain as evidenced by his pain behaviors and Waddell signs," but
6 included the parenthetical proviso: "this does NOT translate to the
7 patient is faking it." (Tr. 326.) During a November 9, 2009,
8 examination, Daniel A. Brzusek, D.O., noted Plaintiff exhibited
9 three of eight Waddell's criteria. (Tr. 694.) Plaintiff argues
10 that Waddell signs are misunderstood and were not intended to be
11 used as indicators of malingering. Notwithstanding Plaintiff's
12 claims, the Ninth Circuit continues to rely upon Waddell signs to
13 indicate malingering. See, e.g., *Satterwaite v. Astrue*, 781
14 F.Supp.2d 898 (9th Cir. 2011). Moreover, Alfred Scottolini, M.D., a
15 reviewing physician opined that Plaintiff presented "a chr[onic]
16 pain syndrome problem, with definite supratentorial aspects
17 Review of this file reveals no anatomical or pathophysiological
18 reason for this [claimant's] allegations, i.e., they are unsupported
19 by clin[ical] evidence." (Tr. 329.) As a result, sufficient evidence
20 exists in the record to support the ALJ's interpretation that
21

22 ¹"Waddell's signs" are a group of physical signs that may
23 indicate a non-organic or psychological component to lower back
24 pain. Waddell's signs are also used to detect malingering or
25 exaggeration in patients complaining of lower back pain. See
26 Waddell, Gordon; John McCulloch, Ed Kummel, Robert Venner
27 (March/April 1980), "Nonorganic Physical Signs in Low-Back Pain,"
28 *Spine* 5(2): 117-125.

1 Plaintiff's complaints about the severity of his symptoms were not
2 credible.

3 Additionally, Plaintiff testified that his daily activity
4 usually involved going to his in-laws' house, where he sits and
5 talks. (Tr. 68-69.) After one to two hours, he drives home, or his
6 spouse drives him. (Tr. 69.) Plaintiff testified that he watches
7 television for about four hours per day, he cannot use a computer,
8 and every two or three days he helps his spouse vacuum and do
9 laundry. (Tr. 69-70.) He sometimes accompanies her to the grocery
10 store, and leans against the magazine rack while she shops. (Tr.
11 71.) He said his son mows his lawn. (Tr. 72.) On his function
12 report, Plaintiff wrote under "house and yard work" that he does his
13 own laundry, has a riding lawn mower, and waters the lawn. (Tr.
14 172.) He stated he does the laundry and waters the lawn weekly.
15 (Tr. 172.)

16 The ALJ's conclusion that Plaintiff's inconsistent statements
17 about the care of his lawn is supported by the evidence. While
18 Plaintiff's statement that he "has" a riding lawn mower is
19 ambiguous, it implies he mows his lawn. Even if the ALJ's
20 interpretation is not reasonable, other substantial evidence in the
21 record supports the ALJ's conclusion that Plaintiff's reported daily
22 activities were inconsistent with his claims about the severity of
23 his impairments. For example, the record supports the ALJ's
24 conclusion that Plaintiff's allegation about his impaired
25 comprehension was inconsistent with his activities. (Tr. 20.)
26 Plaintiff testified that he has trouble reading, he has to read
27 things several times to understand what he has read, and his
28 comprehension is impaired. (Tr. 54-55; 66.) Yet Plaintiff also

1 testified that he assisted people complete immigration forms, and he
2 billed them for his work. (Tr. 57-58.)

3 Plaintiff testified that he has daily severe headaches that
4 require him to take medication and lie down for at least an hour
5 every four hours, daily. (Tr. 60.) He also said he has constant
6 severe neck pain that leaves his fingers and arms numb and his
7 shoulder pain leaves him unable to lift his arms or reach. (Tr. 62-
8 63.) The Plaintiff also complained he drops things without any
9 warning. (Tr. 66.) Plaintiff testified that he has daily low back
10 pain localized in his tailbone and buttocks. (Tr. 63.) He said he
11 can sit for only ten to twenty minutes at a time and stand for about
12 ten minutes. (Tr. 64.)

13 By contrast, Plaintiff testified that he was able to perform
14 many tasks of daily living without assistance. For example, he
15 dresses and bathes himself when he takes his pain medication. He
16 can shave, eat, drive, and he helps with vacuuming, laundry, cooking
17 basic meals, and household tasks. (Tr. 67-71; 171-72; 199; 201.)
18 Because the record supports that Plaintiff could perform many daily
19 tasks that belied his complaints about the severity of his
20 impairments, the ALJ's credibility determination is supported by
21 sufficient evidence and the ALJ's reasons for discounting
22 Plaintiff's credibility are clear and convincing.

23 **3. Step Two: Depression.**

24 Plaintiff argues that the ALJ erred by failing to find
25 depression as one of his severe impairments. (ECF No. 15 at 13-15.)
26 The ALJ found no evidence Plaintiff sought treatment for depression
27 and, thus, concluded that Plaintiff's depression was not medically
28 determinable. (Tr. 18.)

1 At step two of the sequential evaluation process, a plaintiff
2 has the burden to present evidence of medical signs, symptoms, and
3 laboratory findings that establish a medically determinable physical
4 or mental impairment that is severe and that can be expected to
5 result in death or last for a continuous period of at least 12
6 months. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004-05 (9th Cir. 2005)
7 (citing 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D)). A "medical sign"
8 is "an anatomical, physiological, or psychological abnormality that
9 can be shown by medically acceptable clinical and laboratory
10 diagnostic techniques." *Ukolov*, 420 F.3d at 1005. Substantial
11 evidence supports an ALJ's determination that a claimant is not
12 disabled at step two when "there are no medical signs or laboratory
13 findings to substantiate the existence of a medically determinable
14 physical or mental impairment." *Ukolov*, 420 F.3d at 1004-05 (citing
15 SSR 96-4p). An impairment may never be found solely on the basis of
16 the claimant's symptoms. *Ukolov*, 420 F.3d at 1005.

17 Step two is "a de minimis screening device [used] to dispose of
18 groundless claims." *Smolen*, 80 F.3d at 1290. Applying the
19 applicable standard of review to the requirements of step two, a
20 court must determine whether an ALJ had substantial evidence to find
21 the medical evidence clearly established that the claimant did not
22 have a medically severe impairment or combination of impairments.
23 *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An impairment
24 or combination of impairments can be found "not severe" only if the
25 evidence establishes a slight abnormality that has "no more than a
26 minimal effect on an individual's ability to work." *Webb*, 433 F.3d
27 at 686 (citation omitted).

28 In this case, as the ALJ found, the record lacked evidence that

1 Plaintiff sought treatment specifically for depression. (Tr. 18.)
2 The ALJ noted that Plaintiff testified he was taking antidepressant
3 medication, but in 2009, Plaintiff denied he was depressed during a
4 visit with treating physician Dr. Brzusek, D.O. (Tr. 18.) The
5 record supports the ALJ's determination. For example, Daniel
6 Brzusek, D.O., noted after a November 9, 2009, exam that Plaintiff's
7 diagnosis did not include depression, and his mood and affect were
8 not depressed. (Tr. 691-92.) Additionally, in a January 2010 exam,
9 Plaintiff reported to Jane Thompson, Ph.D., that he had been taking
10 antidepressants since June 2009 for depression and the medicine
11 helped him. (Tr. 717.) If an impairment can be controlled
12 effectively with treatment, it is not disabling for social security
13 purposes. See *Warre v. Comm'r of Social Security Administration*,
14 439 F.3d 1001, 1006 (9th Cir. 2006). Additionally, Plaintiff
15 completed a Beck Depression Inventory II (BDI-II), which indicated
16 that he was suffering "from moderate symptoms of depression." (Tr.
17 728.) The record indicates that Plaintiff's depression was mild,
18 and the symptoms were controlled by medication. As a result, the
19 ALJ properly found that depression was not a severe impairment.

20 **4. Residual Functional Capacity.**

21 Plaintiff argues that the hypothetical posed to the vocational
22 expert was flawed because it failed to address Plaintiff's
23 depression and the side effects of his medications. (ECF No. 15 at
24 16.) Plaintiff also argues the ALJ erred by finding a viable labor
25 market existed because the vocational expert acknowledged
26 Plaintiff's inability to use a computer eroded the labor market, but
27 failed to provide specific numbers. (ECF No. 15 at 15.)

28 The ALJ is responsible for determining a claimant's residual

1 functional capacity. SSR 96-5p. A claimant's residual functional
2 capacity is the most the claimant can do, considering his
3 impairments and limitations. SSR 96-8p. In assessing a claimant's
4 residual functional capacity, the ALJ must base his decision on the
5 evidence as a whole, and must consider the entire record and explain
6 how he weighed the medical evidence and testimony. SSR 96-8p. The
7 court will affirm the ALJ's determination of Plaintiff's RFC if the
8 ALJ applied the proper legal standard and the decision is supported
9 by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216
10 (9th Cir. 2005). In this case, the ALJ found that based upon
11 Plaintiff's residual functional capacity, he was able to return to
12 his past relevant work selling cars. (Tr. 25.)

13 The ALJ is "responsible for determining credibility, resolving
14 conflicts in medical testimony and for resolving ambiguities," in
15 these proceedings. *Richardson*, 402 U.S. at 400; *Andrews*, 53 F.3d at
16 1039; SSR 96-8p. The final determination regarding a claimant's
17 ability to perform basic work is the sole responsibility of the ALJ.
18 20 C.F.R. §§ 404.1546, 416.946; SSR 96-5p (RFC assessment is an
19 administrative finding of fact reserved to the ALJ). As discussed
20 above, the ALJ considered the record in its entirety and factored in
21 both the lack of medical evidence related to treatment for
22 depression, and Plaintiff's lack of credibility. As such,
23 Plaintiff's depression and limitations caused by symptoms were
24 properly excluded from the hypothetical and RFC. Additionally, the
25 ALJ neither found, nor did Plaintiff establish, that Plaintiff is
26 incapable of using a computer. Instead, Plaintiff merely testified
27 that he "tried to learn how to use [his daughter's computer] and I
28 get lost and don't know what to do." (Tr. 70.) Evidence does not

1 exist in the record that Plaintiff's alleged inability to use the
2 computer is related to a medically determinable impairment.

3 The RFC is supported by substantial evidence in the record and
4 the hypothetical to the vocational expert properly incorporated the
5 limitations identified by the ALJ. The hypothetical posed to the
6 vocational expert contained all of the limitations that the ALJ
7 found credible and supported by substantial evidence in the record.
8 The ALJ's reliance on testimony the VE gave in response to the
9 hypothetical therefore was proper. See *Magallenes v. Bowen*, 881
10 F.2d 747, 756-57 (9th Cir. 1989) (it is proper for an ALJ to limit
11 a hypothetical to restrictions supported by substantial evidence in
12 the record). *Bayliss*, 427 F.3d at 1217-18. Where the ALJ's
13 determination is a rational interpretation of the evidence, and
14 substantial evidence supports the determination of disability, the
15 court may not substitute its judgment for that of the Commissioner.
16 *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). As a result,
17 the ALJ did not err.

18 CONCLUSION

19 Having reviewed the record and the ALJ's findings, this court
20 concludes the ALJ's decision is supported by substantial evidence
21 and is not based on error. Accordingly,

22 IT IS ORDERED:

23 1. Plaintiff's Motion for Summary Judgment (**ECF NO. 14**) is
24 **DENIED;**

25 2. Defendant's Motion for Summary Judgment (**ECF NO. 16**) is
26 **GRANTED;**

27 The District Court Executive is directed to file this Order and
28 provide a copy to counsel for Plaintiff and Defendant. The file

1 shall be closed and judgment entered for Defendant.

2 DATED February 21, 2012.

3
4 S/ CYNTHIA IMBROGNO
5 UNITED STATES MAGISTRATE JUDGE
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